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MARTIAL LAW.

I. *In Time of Peace.*

There is a radical divergence of opinion expressed in certain recent cases as to the powers which the law vouchsafes to military authorities when martial law has been proclaimed by the governor of a state, or when without formal proclamation the militia has been called out to deal with striking miners, "night riders," or other rioters, or to cope with such desperate emergencies as the great San Francisco fire or the Galveston flood.

On the one hand it is maintained that a soldier in active service has extraordinary powers and is not amenable to the courts for acts performed in obedience to the orders of his superior officers; that neither commanding officer nor private is liable to criminal prosecution or to civil action at the instance of citizens molested in the honest performance of military duty.

On the other hand it is contended that a soldier, though regularly called into active service and acting within the strict limit of his military orders, has no power to make an arrest or do any act that a civil peace officer, such as a sheriff or policeman, might not do in preserving the peace.¹

The former theory was acted upon in San Francisco, when, on the first day of the great fire following the earthquake, the Mayor issued his famous proclamation that "The Federal Troops, the Members of the Police Force, and all Special Police Officers have been authorized to kill any and all persons found engaged in looting, or in the commission of any other crime."

The shooting down of individuals caught in theft would, under the ordinary law, be murder, both in the slayer and in the officer giving the command, unless the killing were reasonably necessary to overcome active resistance to an arrest. Could a guard, in a criminal prosecution for homicide, justify shooting a thief on the ground that he was doing his military duty and that a condition of martial law prevailed? This defense was actually set up in one or two prosecutions for such homicides in San Francisco, but, owing to acquittals, the question was not brought before an appellate court.

In the celebrated case of *Ex parte Milligan*,² the Supreme

¹Franks v. Smith (Ky. 1911) 134 S. W. 484.

²(1866) 4 Wall. 2.

Court of the United States discusses adversely the contention that military authority can go to the extent of trying a traitor by military commission or suspending the ordinary process of law, and declares that no doctrine involving more pernicious consequences was ever invented by the wit of man than that any of the provisions of the Constitution can be suspended during any of the great exigencies of government.

Martial law was said to be limited to the time and locality of actual war, although Chase, *C. J.*, and three other justices, dissenting, held it could be exercised at other periods of public danger.

Ex parte Milligan, however, properly relates only to federal martial law, exercised by virtue of the war power, and not to state martial law, exercised by the governor of a state, as chief conservator of the peace.

The question as to the power of the legislature of a state to declare martial law was expressly left open by Taney, *C. J.*, in *Luther v. Borden*,³ the act of the legislature of Rhode Island during Dorr's Rebellion declaring martial law to be in full force in that State, not being material to the decision of the case.

The courts of Colorado and Idaho have held that it is within the discretion of the governor, in times of continued rioting or disorder, such as sometimes occurs in the mining regions of those states, to declare a county or district to be in a state of "insurrection and rebellion," and thereby to subject the whole population absolutely for the time being to his military orders. The executive alone is to decide whether the exigency is such as to require martial law, how long it is to continue in force, and the measures taken by the military authorities cannot be inquired into or reviewed by the courts.⁴ The law is superseded by the bayonet and the fiat of the executive.

A Pennsylvania case⁵ which involves the question of martial law as a justification for homicide arose during a strike which spread over nearly the whole of the anthracite coal region in Pennsylvania in 1902. Several houses occupied by non-union men had been dynamited, and the general in command of the state troops ordered a detail of soldiers to be posted around a certain house in order to guard it, with orders to halt all persons prowling

³(1849) 7 How. 1.

⁴In *re Moyer* (1905) 35 Col. 159; In *re Boyle* (1899) 6 Idaho 609; see also In *re Kalaniana'ole* (1895) 10 Hawaii Rep. 29; *Barcelon v. Baker* (1905) 5 Philippine Rep. 87, collecting cases.

⁵*Commonwealth v. Shortall* (1903) 206 Pa. St. 165.

around or approaching the house, and if the persons challenged failed to respond, after due warning, to shoot, and shoot to kill.

About 11:30 in the evening one of the sentries discovered a man approaching along the side of the road nearest the house, and called "Halt!"; the man continued to advance toward the gate; a second time he called "Halt!" and again "Halt!" The man by this time had opened the gate, and was coming into the yard, when the sentry, in accordance with his orders, fired, and the man fell to the ground outside the gate, dead. The unfortunate victim was not shown to have been one of the mob gathered in the vicinity, or to have manifested or intended any violence. A coroner's inquest was held and the jury found that the shooting was hasty and unjustifiable. The sentry was, accordingly, arrested on a charge of manslaughter, but on *habeas corpus*, the Supreme Court of Pennsylvania held that there was not even a *prima facie* case of guilt on the evidence and no legal ground for subjecting the defendant to trial, and he was accordingly discharged.

It would seem that the decision must be supported, if at all, on one of the two theories propounded by the court:

(1) That the orders of a superior officer, even if illegal, are a justification to a soldier for homicide, which would otherwise be murder; or

(2) That the situation being one of martial law, the commanding general was authorized to use as forcible military means for the repression of violence as his judgment dictated to be necessary, including the infliction of death on peaceable citizens for disobeying the orders of his soldiers to halt. Otherwise, it would seem that the verdict of the coroner's jury was correct, even judged by the appearance of things at the time, for there seems, in fact, to have been no reasonable cause or necessity for the shooting. There was at least sufficient doubt on this point so that the question might properly have been tried by a jury. If the guard could have arrested the deceased without resort to such violent means as taking his life, then the killing was unnecessary and unlawful, and amounted to murder under ordinary law. Only if the sentry had had some reasonable ground to believe from the man's actions under the circumstances that an attempt was being made to dynamite the house, or that it was necessary to shoot for the prevention of other dangerous violence, would he have been justified in shooting to kill.

In the course of its opinion, the court expounds its theory of

martial law at some length and says that the general order of the governor in calling out the troops was a declaration of "qualified martial law," "qualified," because put in force only for the preservation of the public peace and order, and not for the ascertainment or vindication of private rights, or the other ordinary functions of government.

"Martial law exists wherever the military arm of the government is called into service to suppress disorder and restore the public peace." * * * * The resort to military aid necessarily means that the "rule of force under military methods is substituted" for civil authority "to whatever extent may be necessary in the discretion of the military commander," * * * and in respect to the commander's powers "there is no difference between a public war and a domestic insurrection."⁶

The first case in which the Supreme Court of the United States has recognized any such extreme doctrine as to the martial powers which may be exercised by the chief magistrate of a state in time of emergency and disorder was decided in 1909. Charles H. Moyer, President of the Western Federation of Miners, sued former Governor Peabody of Colorado for false imprisonment without due process of law at the hands of the militia acting under the Governor's orders. Moyer was not arrested as a rioter *flagrante delicto*, but merely on suspicion of being connected with the riotous disturbances among the miners. He was detained by the military authorities for over two months, it was alleged, without probable cause, and without an attempt to bring him before the courts or prefer a charge of crime.⁷

The Circuit Court sustained a demurrer to the complaint and the Supreme Court affirmed the decision on the ground that the allegations did not show that he had been deprived of his liberty without due process of law.

The court, through Holmes, *J.*, held that the Governor's declaration that an insurrection exists is conclusive of the fact; and that the Governor's military representative may not only order a company to fire on a mob, *flagrante delicto*, when actually engaged in a breach of the peace, but that he may seize and detain, by way of preventive arrest, those whom he considers to stand in the way of restoring peace.

A military officer acting under orders of the governor or of the President, upon proper request of the state, thus has not merely

⁶Commonwealth v. Shortall *supra* 170, 172.

⁷Moyer v. Peabody (1909) 212 U. S. 78.

the authority of an ordinary peace officer, but also the power to arrest and detain, at his discretion, persons suspected of complicity in rioting and mob violence, without warrant and without any form of judicial investigation, at least so far as the Fourteenth Amendment is concerned.

The commander may disregard the writ of *habeas corpus*, if issued, and detain citizens upon suspicion merely, without preferring any charge of crime against them. The governor or his representative is sole judge of the necessity for such measures of resistance and precaution.

"* * * So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief * * *"⁸

It may well be questioned whether this doctrine is not too sweeping and whether the employment of military force in the public defense like the exercise of the right of private self defense by an individual should not be limited by reasonable necessity.

It has always been supposed to be the common law that a military commander may be held accountable after the exigency has passed, either by prosecution in the criminal courts, or by civil action at the instance of the parties aggrieved, and compelled to show reasonable ground for believing that the infringement of personal and property rights was demanded by the occasion.⁹ But the Supreme Court now holds that a wanton abuse of power must be alleged, and that the discretion of the commander is limited only by good faith.

Holmes, *J.*, says, in his opinion:¹⁰

"* * * When it comes to a decision by the head of the State upon a matter involving its life, 'the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process * * *'"

Does he mean warrants the superseding of judicial inquiry or merely a postponement of it?

It is true that under the ordinary law, which at all times prevails, in case of actual or apparent necessity to prevent the spread-

⁸*Moyer v. Peabody supra*, 85.

⁹Stephen, *History of Criminal Law*, 214; *Ela v. Smith* (Mass.) 1855) 5 Gray 121.

¹⁰*Moyer v. Peabody supra*, 85.

ing of a fire, the ravages of a pestilence, or any other great public calamity, private property may be dynamited, burned, or otherwise destroyed for the public safety by any citizen without liability for damage on the part of the destroyer, or claim for indemnity on the part of the owner, provided the justification can be shown.¹¹

The impressing of private property into public service is a somewhat similar question; while on extraordinary occasions of public danger, necessity will justify the summary appropriation by public authority of land, provisions, boats, horses and wagons or whatever may be needed for the immediate preservation, relief and protection of the inhabitants, yet in such cases the city or other public authority is liable to make just compensation to the owner of the property so impressed. If the implied authorization of necessity cannot be shown, the individual taker is liable civilly and perhaps criminally for the taking.¹²

But in all these cases the jurisdiction of the courts is merely postponed, not ousted. The exercise of the supreme force of the state is at all times guided by law, not by executive discretion, and remains subject to judicial investigation and review.

It is believed that there is no warrant in the history of constitutional government for vesting in the governor, as commander of the military forces of the state the absolute discretionary power of arrest, and, as a logical consequence, of life and death, so that his command or proclamation may take the place of a statute, and convert larceny into a capital offense, or going beyond legislative power, deprive citizens unreasonably and arbitrarily of life or liberty without review in the courts.¹³

The true view, undoubtedly, is that during a riot or other disturbance militia-men and their officers are authorized to act merely as a body of armed police with the ordinary powers of police officers.¹⁴ Their military character cannot give them immunity for unreasonable excess of force. The governor of a state, as commander of the militia, is merely the chief conservator

¹¹*Russell v. Mayor of New York* (N. Y. 1845) 2 Denio 461, 474; *Bowditch v. Boston* (1879) 101 U. S. 16.

¹²*Mitchell v. Harmony* (1851) 13 How. 115; see *Chicago League Ball Club v. City of Chicago* (1897) 77 Ill. App. 124; *cf. City of Galveston v. Brown* (1902) 28 Tex. Civ. App. 274. In San Francisco the "Finance Committee" of the "Citizens Committee of Fifty," to which succeeded the "Red Cross and Relief Fund," a corporation, held itself liable for property taken for public use in the emergency.

¹³*Johnson v. Jones* (1867) 44 Ill. 142; *Ela v. Smith* (Mass. 1855) 5 Gray 121.

¹⁴*Franks v. Smith* (Ky. 1911) 134 S. W. 484. This is as far as the actual decision goes in *Luther v. Borden* (1849) 7 How. 1.

of the peace, and entirely destitute of power to proclaim martial law, punish criminals or subject citizens to arbitrary military orders which he unreasonably believes to be demanded by public emergency.

II. *In Time of War.*

The question remains whether we may have federal martial law by virtue of the "War Power" during invasion or insurrection in domestic territory.

In war the enemy, be he a foreign one or a rebel to whom the status of belligerent has been given, has no legal rights which the invader must respect except those rights which International Law recognizes.¹⁵

When a civil contest becomes a public war, all persons living within hostile limits become *ipso facto* enemies by their residence in enemy territory.

An army in the enemy's country is thus governed by the laws of war, and officers and soldiers are responsible only to their own government. But in domestic territory the status of the army is entirely different. The civil rights of citizens are not suspended but remain the same as in peace, both in districts near to and remote from the theater of actual warfare. The occurrence of hostilities does not vary the position of the citizen or deprive him of the protection of the Constitution, unless the army is in the position of a foreign invader and the country is ruled from without, acquiring the status of enemy territory.¹⁶

The Federal Constitution prohibits the federal government from suspending the privilege of *habeas corpus* except when, in cases of invasion or insurrection, the public safety may require it. Aside from the specific provisions of their own Constitutions and the Fourteenth Amendment, the states are free to suspend the writ at any time.¹⁷ But the only effect of the suspension of the writ is to take away that particular remedy. It does not abolish trial by jury. It does not operate to legalize arbitrary arrest, although sometimes it has been supposed to do so.¹⁸ The suspension

¹⁵Prize Cases (1862) 2 Black 635, 17 L. Ed. 459; Willoughby, The Constitution, § 714.

¹⁶Dow v. Johnson (1858) 100 U. S. 158; Smith v. Shaw (N. Y. 1815) 12 Johns. 257; cf. Ex parte Vallandigham (1863) Fed. Cas. No. 16816, 1 Wall 243.

¹⁷Moyer v. Peabody (1909) 212 U. S. 78, 53 L. Ed. 410.

¹⁸Ex parte Milligan (1866) 4 Wall. 2; cf. McCall v. McDowell (1867) 1 Abb. 212, Fed. Cas. No. 1235.

of the writ of *habeas corpus* thus falls far short of the establishment of Martial Law.

The Supreme Court has, however, been careful to admit that in time of war there may be occasions when Martial Law can be properly applied. Thus in *Ex parte Milligan* it was said that if, in foreign invasion or civil war, the courts are actually closed, then on the theatre of active military operations military authority of necessity supersedes civil authority.¹⁹ This admission, however, seems improper and inconsistent with the doctrine of the case that the Constitution of the United States is a law for rulers and people equally in war and in peace, and that none of its provisions can be suspended.

What may be done on the theatre of active military operations when our armies are advancing, retreating, or operating within our own territory depends upon military necessity for the public defense, and is to be judged by the circumstances and exigencies of the particular case, which may be reviewed by the courts irrespective of military proclamations.²⁰ Citizens cannot be arrested, deported, imprisoned, or put to death by arbitrary military authority when war is raging any more than during a state of peace, and the fact that the courts are closed or that a proclamation of Martial Law has been made will not justify a resort to the arbitrary unregulated exercise of military power.

The Privy Council, however, has recently held that the English Law is otherwise.²¹ In the late British-Boer war, Martial Law was proclaimed and exercised throughout the frontier districts of Cape Colony and Natal. It extended over all persons residing in these districts, even though no active military operations were being conducted therein, and the courts were still open and undisturbed. In such a district, that of Paarl, where considerable sympathy with the Boers and dissatisfaction with English rule were felt, one D. F. Marais, a civilian subject of the crown, was arrested by order of the military authorities for military reasons without warrant or criminal charge. He was removed 300 miles to the town of Beaufort West where he was detained in military custody. He made application to the Supreme Court of the Cape of Good Hope at Cape Town for release on the ground that his arrest and imprison-

¹⁹(1866) 4 Wall. 2, 127, 18 L. Ed. 281; see also *Beckwith v. Bean* (1878) 98 U. S. 266, 308, 25 L. Ed. 124; *Johnson v. Jones* (1867) 44 Ill. 142, 92 Am. Dec. 152.

²⁰*Mitchell v. Harmony* (1851) 13 How. 115, 14 L. Ed. 75.

²¹*Ex parte D. F. Marais* L. R. [1902] A. C. 109.

ment were in violation of the fundamental liberties of His Majesty's subjects, but his application was rejected.

The Privy Council refused the petitioner Marais leave to appeal from this decision on the ground that Martial Law having been declared in the districts both of Paarl and Beaufort West the court ought not to go into the necessity of such proclamation or inquire into the acts of the military authorities in pursuance of it. The supreme court of appeal over all the British colonial dominions pronounces it to be the law that when actual war is raging civil courts have no jurisdiction to deal with military action and that a state of war exists whenever the military authorities choose to say so. This decision is not based on the ground that the Constitution does not follow the flag into foreign dependencies, nor that the authority of Parliament had been exercised to supersede the established course of justice, nor that these districts were enemy territory in military occupation. The learned Chancellor in delivering his judgment oracularly says: "The framers of the Petition of Right knew well what they meant when they made the condition of peace the ground of illegality of unconstitutional procedure."²²

But as Sir Frederick Pollock points out in a learned and striking article no such limitation is expressed in the document.²³ The very object of the Petition of Right, assented to by Charles I in 1628, was to overthrow the royal theory that in times of disturbance or insurrection the executive has power to keep men in prison without bringing them to trial or assigning cause for their imprisonment, or summarily to execute rebellious subjects under commission of Martial Law outside the ordinary courts. This Marais decision, therefore, misquotes and judicially repeals the Petition of Right, and has taxed to the uttermost the ingenuity of the learned English commentators.²⁴

The doctrine that when once the status of actual war is established by proclamation or otherwise, the civil courts have no more jurisdiction of military action toward citizens, is based on a misconception of the maxim "*Inter armes silent leges*," which means merely that between enemies the law of war, a branch of International Law, governs combatants and non-combatants; it clearly

²²Ex parte D. F. Marais *supra*, 115.

²³18 Law Q. Rev. 152.

²⁴Sir Frederick Pollock, 18 Law Q. Rev. 152-158. "What is Martial Law?" Cyril Dodd, The Case of Marais, *Ibid.* 143-151. Dicey, Law of the Constitution, (6th ed.) 287, 502-510.

does not mean that on the occurrence of war, the government of England, of the United States, or of a state can by proclamation be converted into a military despotism.

In a garrisoned city, held as an outpost of loyal territory, or in home districts threatened or recently evacuated by the enemy, military necessity for the public defence would certainly justify all temporary restrictions on the liberty of citizens essential to military operations, such as the extinguishment of lights, the requiring of military passes to enter or depart, and the quelling of public disorder. But the prosecution and punishment of persons suspected of conspiracy, sedition, or disloyal practices, and of treason itself, belong to the tribunals of the law, and not to the sword and bayonet of the military. Where the army is not invading enemy territory of a recognized belligerent, but is in its own territory, the military authorities remain liable to be called to account either in *habeas corpus* or any other judicial proceeding for excess of authority toward citizens, no matter whether it occurred in propinquity to the field of actual hostilities or while the courts were closed, or after a proclamation of Martial Law.

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